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SUPREME COURT OF THE UNITED STATES

(October Term, 19[illegible])

No. 39

ABIE STATE BANK, ABIE, NEBRASKA,

Appellant

v.

ARTHUR J WEAVER, as Governor of the State of Nebraska, and CLARENCE G. REED, as Secretary of the Department of Trade and Commerce,

WILLIS M. [illegible], as Treasurer of the State of Nebraska,

MARY E. SANDY, JAMES H. COVEY, THEODORE H. BEELE, HOFFMAN & SEYMOUR, INC. (a corporation), LEONARD N. SEYMOUR, JOHN HALLER and FRANK A. HEBENSTREIT,

Appellees.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA

Brief of Appellees, Mary E. Gandy, James H. Covey, Theodore H. Beele, Hoffman & Seymour, Inc. (a corporation), Leonard N. Seymour, John Haller and Frank A. Hebenstreit

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IN THE

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ABIE STATE BANK, ABIE, NEBRASKA,

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ARTHUR J. WEAVER, as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,

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STATEMENT OF THE CASE

The appellant has appealed from a decision of the Nebraska Supreme Court in Abie State Bank vs. Weaver et al., 119 Neb. 153.

This action was begun in equity in the District Court of Lancaster County, Nebraska, by appellant and many other banks to enjoin the defendants, State Officers of the State of Nebraska, from levying and collecting the special assessments under the Depositors Guaranty Fund Law.

These appellees, interveners below, intervened in the action brought by appellant in the District Court of Lancaster County, Nebraska, as depositors in the failed State banks of the State of Nebraska on behalf of themselves and other depositors similarly situated whose accrued and adjudicated claims against the Guaranty Fund had not been paid.

During the trial these interveners introduced testimony and they participated throughout the trial of the case.

The pleadings of interveners (Supp. Rec. pp. 19-38) set forth in substance the following facts: That the respective interveners were depositors in the State banks of Nebraska and that the banks referred to were insolvent and were taken over by the Guaranty Fund Commission; that the deposits of interveners in such failed banks had not been paid as required by the Guaranty Fund Law of Nebraska, and could not be paid except by collection of the assessments, which were enjoined in this action; that the State banks of Nebraska received charters from the State, and that some had begun operation prior and some subsequent to the enactment of the Bank Guaranty Law; that the assessment herein attacked was levied for

the purpose of paying the accrued and adjudicated claims of depositors of failed banks; that there are no set-offs against or defenses to the claims of interveners: that the Guaranty Act of the State of Nebraska became a law in the year 1909, and has since that time with certain amendments thereto been in force and effect and that the plaintiff and all banks of the State of Nebraska have operated under said Act and have received and accepted the benefits of said Act and the amendments thereto; that the plaintiff and all other State banks have during that time invited and induced their customers to deposit and keep money in their banks by reason of the protection afforded to such depositors on account of said Act, and that the said banks represented that the depositors were securely protected by said Act, and that the banks by such means caused their customers to make and maintain large deposits in their banks, and that a large number of the past and present depositors in said State banks, among which were those of interveners, have been made and kept in said banks by reason of the conduct and representations of the plaintiff banks; that such deposits were accepted by the banks with full knowledge of their obligations to contribute to the Guaranty Fund; that the original Guarantee Act was enacted by the State of Nebraska for the regulation and protection of its trade and commerce, and as a proper exercise of the police power of the State; that under the Act the plaintiff and other State banks have constituted themselves an association for the protection of the depositors in said banks, and have been free to elect whether to accept the benefits and obligations under the Act or to surrender their charters and discontinue business, and that the plaintiff bank and all other banks have elected to receive the benefits and assume the burdens of the Act, and that such election has created a contractual relation between the State banks and interveners and between the banks themselves, and that each bank has obligated itself to pay the assess-

ments provided by law for the protection of the depositors of the banks; that of the 739 banks in the State, 180 banks have failed to join in this action and to release the other members of the association from their assessment and obligation; that the Guaranty Fund Act and its amendments constitute a valid part of the charter of each of the State banks of the State of Nebraska.

That under the Guaranty Fund Act as amended, a Guaranty Fund Commission was created for the purpose of assisting in the administration of the Depositors Guaranty Fund; that since the original enactment of the law 264 State banks have become insolvent; that 129 of said banks have been liquidated and their depositors paid in full from the assets of said banks, supplemented by assessments as provided in the Act; that a number of insolvent State banks are now under the control of the Guaranty Fund Commission; that since the enactment of the law there has been paid into the Guaranty Fund by the banks an amount in excess of fifteen million dollars; that assets of great value of a number of failed banks are in possession and under control of the Guaranty Fund Commission and are being liquidated through such commission for the benefit of the banks in whose behalf this action was brought and the other State banks of the State of Nebraska; that the assessment involved in this action was made in order that cash might be presently available to meet the obligations of payment to interveners and other depositors similarly situated; that the regular annual assessment of 1/10 of 1 per cent of the average deposits under the Guaranty Fund Act provides funds only sufficient to pay the cost of administering the Act; that at the time of the commencement of this action the State banks of the State of Nebraska were in a prosperous condition, and were in better position to pay the assessments to the Guaranty Fund than at any time since the enactment of the law; that under present condition of the banks, the special assessment of 5/10 of 1 per cent can be paid by them

without confiscation of property or injury to their business; that the banks are quasi public corporations and that the intervener depositors with adjudicated claims are entitled to payment of their deposits.

The interveners prayed for the dismissal of the petition and for other relief. (Answer and Cross-petition Mary E. Gandy, Supp, Rec. pp. 19-28), (Answer and Cross-petition of James H. Covey, et al Supp, Rec. pp. 28-40).

Interveners Frank A. Hebenstreit and John Halbur demurred to the petition of the plaintiff banks (Supp, Rec. pp. 17-18).

Issues were joined upon the pleadings of interveners and upon the trial the plaintiff banks prevailed in the lower State Court. (Rec. pp. 41-57).

Upon an appeal being taken to the Supreme Court of the State of Nebraska the decision of the District Court was reversed. (Abie State Bank vs. Weaver, 119 Neb. 153).

Thereafter this appeal was prosecuted by the Abie State Bank on behalf of itself as appellant.

Appellees will, in submitting statement of the case, supply certain omissions and call attention to certain inaccuracies in the brief of appellant and in order to avoid repetition, interveners adopt by reference brief of appellees, Weaver as Governor et al., except however, interveners do not concede the propriety in this action of the references on pages 134, 214 and 217 of appellees' brief, being their Propositions of Law number 20 and 21, to certain legislation purporting to repeal the Guaranty Fund Act, which was passed at the Extraordinary Session of the Legislature of Nebraska during March, 1930, for the reason these appellees contend,

even admitting for the purpose of argument, and for no other purpose, the right of the Legislature to repeal the Act, such legislation does not cause the issue in this cause to become moot so as to prevent the consideration by this Court, because the liabilities to interveners were adjudicated and fixed as claims during the time the special assessment herein attacked was in full force and effect.

Appellant contends that the special assessment provided for in the Guaranty Act is confiscatory, that it results in the taking of its property without due process of law, and therefore is violative of the Fourteenth Amendment to the Constitution of the United States, and that under present conditions the Act cannot reasonably accomplish the apparent purpose for which it was enacted.

STATEMENT OF THE EVIDENCE (Supplementary)

The evidence introduced upon trial of the case was voluminous, but was not greatly conflicting. Portions of the evidence has been set up in appellant's brief and other portions in the brief of appellees, Weaver et al. These appellees set forth only portions of the evidence which are necessary to supplement such statement and which should have consideration by the Court.

A considerable portion of the evidence consists of tabulations, reports and statements of auditors which are, for the most part, incomplete, in that the tabulations submitted on behalf of appellant cover only a portion of the banks of Nebraska. Almost all of the oral testimony introduced on behalf of the banks consists of opinions or speculations of the various witnesses, for illustration, the testimony of witnesses Peterson, Stephens, and Schantz.

180 of the 739 banks of the State were not parties to this action and no testimony relative to these banks was submitted.

It is believed that, taken in conjunction with the statement of evidence in other briefs, the following statement will permit the Court to have before it the salient facts without necessity of having recourse to the record for a complete understanding of the matters at issue.

These appellees have refrained from a quotation of figures for the reason that much of this data is provided in the other briefs.

Appellant, to sustain its contention that the Act is confiscatory, submitted evidence which purports to show that a considerable number of the State banks are in unsatisfactory financial condition and that only a portion of the banks have been able during recent years to earn satisfactory dividends upon the capital invested.

In support of this contention of appellant, the tabulation prepared by the witness, Mooney, was offered and received in evidence. However, the witness testified that in making the conclusions relative to profits of the banks, he compiled data only as to those which were earning net profits of less than six per cent on their capital (Rec. p. 134, Qs. 371-372) and (Rec. p. 142, Qs. 441-442), and so it is disclosed that in such compilation instead of showing facts as to individual banks in relation to their size, their territory and potential possibilities, information is produced only with reference to banks which are admittedly unsuccessful without disclosing the cause of their lack of success and their present inability to operate profitably and earn dividends.

Appellant shows that the going banks had on hand about the time of the commencing of this action a large amount of "other real estate" and that this real estate

was carried on the books of the bank at an excessive value. (Rec. pp. 155, 157, and 158, Qs. 579, 581, 581).

The evidence discloses also that it was reported to the bankers of the State in 1927 that between 350 and 400 banks would have their capital impaired if paper criticized by the examiners was charged off (Rec. p. 160, Q. 594) although a number of these banks would have had only slight impairment if their losses were charged off. (Rec. p. 162, Qs. 608-609).

All of the banks in Nebraska under the Act made money from the years 1910 to 1920. At that time loans were being made on real estate equities and because of excessive amounts of money in banks, the bankers frequently solicited persons who were not customers to borrow money from the banks to engage in speculation. (Rec. pp. 241-242, Q. 1244). From the year 1920, because of a drop of prices of farm lands and farm commodities and general deflation there were many losses. There would have been many bank failures and losses in banks if there had been no fall in prices because of the recklessness in making loans. (Rec. pp. 241-243, Q. 1246). The causes of many failures of the banks were incompetency and a betrayal of trust in addition to the natural depression after the war. (Rec. pp. 241-245). Nebraska had too many banks. At one time it had an average of one bank for each 1200 people. (Rec. pp. 245-246, Q. 1259).

The Guaranty Fund Act assessments from 1923 to 1928 did not contribute to the failure of banks during the period and were a steadying influence on deposits (Rec. pp. 246-247, Qs. 1263-1264), and by reason of the Guaranty Fund Act the deposits in the State banks increased at least one hundred million dollars. (Rec. p. 247, Q. 1265). The condition of the State banks was incomparably better in 1928 than in 1923. (Rec. p. 248, Q. 1271).

A bank properly conducted with adequate capital should be able to pay the assessments (both regular and special) of six-tenths of one per cent on their average deposits, and if unable to do so, it should not survive. (Testimony of witness, Stephens, Rec. p. 542, Qs. 3471-3473).

The evidence discloses that the unsatisfactory condition of the going banks at the present time and the failure of other banks were caused by losses which occurred by reason of business done during the years from 1910 to 1920, and that the present situation is the result of the previous speculation (Rec. pp. 107, 108, Qs. 213-214). The majority of the State banks could pay the Guaranty Fund assessment without material disadvantage or impairment of their capital. (Rec. p. 210, Qs. 1054-1055).

One half of the banks would not have closed if there had not been inefficiency upon the part of the officers, (Rec. p. 112, Q. 255), and evidence of fraudulent conduct on the part of the officers of the banks was found in a large number of the banks and was a material item in the losses of the banks. (Rec. pp. 118-119, Qs. 304, 305 and 306).

With reference to the Abie State Bank, it is disclosed by the evidence that the bank was located in a town of 200 people, that it had a capital of $15,000.00 and a surplus of $2,500.00, but the capital had been increased from $10,000.00 to $15,000.00 by earnings, and the bank had paid dividends up to the year 1921, and also paid dividends during the year 1926; that the dividends paid were from ten per cent to fifteen per cent. In 1928 the deposits in the bank were $182,000.00 and the loans and discounts were $159,000.00. The bank had a salary account of $3,180.00 a year, paid interest on deposits of $5,807.38 and had other expenses of $2,079.63. (Rec. pp. 167, 176. There were banks in other towns at a dis-

tance of 4, 6, 9 and 15 miles respectively and these banks were strong competitors. (Rec. pp. 174, 175 Q. 749, 759). The bank had charged off paper before and was carrying other real estate as a result of a loan made to a relative and other loans had been made to relatives in the amount of $4000. (Rec. pp. 179-180, 184). The bank had received public deposits without giving bond up to the year of 1928 and generally depositors had been told they were protected by the Guaranty Fund Act. (Rec. p. 184. Q. 839-842-843).

There is nothing in the record which discloses that the Abie State Bank was conducted in a proper manner and in accordance with good banking practices. It is disclosed that the bank has not paid dividends during recent years with the exception of one dividend in 1926, but so far as the proper operation of the bank is concerned, the record is silent.

The State Bank of Omaha of which Mr. Schantz was president and the Fremont State Bank of which Mr. Stephens was president were highly successful banks and were being operated at large profits.

EVIDENCE AS TO WAIVER AND ESTOPPEL

In May 1927 a report was made to the bankers of the state as to the condition of the Guaranty Fund and as to the conditions of the banks throughout the State. (Rec. p. 198. Q. 927 to 930). During the year 1926 and during 1927 the banks of the State carried on an extensive advertising campaign and attempted to induce the making and maintaining of deposits by reason of the existence of the Bank Guaranty Act. A Legislative committee of the State Bankers Association sponsored and submitted legislation some of which was later enacted and which affected the operation of the Guaranty Fund Act. (Rec. p. 240 and Sup. Rec. pp 52 and 55).

The information was given to the bankers of the State that many of the going banks were in a bad financial condition and if worthless paper was charged off, the capital of many of the banks would be impaired. (Rec. pp. 189-191). During the various sessions of the legislature bankers from various districts throughout the State were represented and participated in hearings before the legislative committees relative to proposed amendments of the Guaranty Fund Law.

The bankers of the State urged the amendment of the Guaranty Fund Law at the Legislative Session in 1923. The purpose of this law was to give bankers an active part in the settling and closing out of failed banks, and they advocated that the Guaranty Fund Commission be composed of bankers nominated by themselves. Discussions relative to the Act were conducted for sometime before its passage. (Supp. Rec. pp. 52-54).

The fact of a deficiency in the Guaranty Fund in the amount of three million dollars was known to the bankers of the State in 1925 and they continued thereafter to advertise the security of the Guaranty Fund and its advantages to depositors in banks. (Rec. p. 548). In August, 1927, a letter was sent to each bank in the state of Nebraska advising it that the net liabilities of the Guaranty Fund were at that time in excess of six million dollars.

The banks thereafter continued their advertising and the Fremont State Bank ran an advertisement on January 25th, 1928 in reference to the security of deposits under operation of the Act and The State Bank of Omaha on March 10th, 1928, and thereafter, circulated documents referring to the Guaranty Fund Law and its advantages. (Rec. pp. 627, 629).

The signs in and upon the premises of the various banks in the State which referred to the security of de-

posits under the Act were generally maintained until a short time previous to the institution of this action on December 21, 1928.

Checks furnished depositors, deposit slips and the bank stationery generally carried the wording that the deposits in the bank were protected by the Guaranty Fund Law up to the date of the institution of this action.

The first definite information relative to the condition of the Guaranty Fund and the large deficits which had arisen in said fund were given to the public through a newspaper article which was published only a short time before the institution of this action.

EVIDENCE RELATIVE TO STATUS OF INTERVENERS AS DEPOSITORS

The status of these appellees interveners below as depositors in the respective banks is shown by stipulations appearing in Supp. Rec. pp. 45 to 47 and testimony of Witness Hebenstreit (Supp. Rec. pp. 47 to 50), also stipulation. (Rec. pp. 358 to 360 Inc.).

Under these stipulations interveners are shown to be depositors in failed banks whose claims are for the most adjudicated and whose deposits were made by reason of advertisements of the banks and the holding out by the banks of the advantages and security of the bank depositors Guaranty Fund, and in reliance thereon.

CONTENTIONS OF INTERVENERS

The contentions of interveners in this cause are:

1. That the decision of the State Court is based on Federal and non-Federal questions, and by reason of the fact that the decision of the Federal question was not

necessary to the determination of the case, the Supreme Court of the United States will not take jurisdiction.

2. That this precise Guaranty Fund Act and the assessments provided thereunder have been held not violative of any provision of the Constitution of the United States.

3. That the Legislature has the right by proper regulatory measure to control the quasi public business of banking within the State, and that the court should not interfere with the exercise of this legislative function.

4. That the Act prescribes a contract between the banks and the depositors, and under this contract the rights of the intervening depositors have accrued.

5. That the banks have failed to sustain their contention that the special assessment provided in the Act, as a matter of fact, is confiscatory or that it deprives them of their property without due process of law.

6. That the banks have waived their rights to question the constitutionality of the Act by accepting benefits thereunder over a long period of years, and should be estopped from contesting the collection of the special assessment enacted to pay net liabilities to depositors accruing under the Act.

ARGUMENT

SUMMARY OF ARGUMENT

These interveners have immediately above set forth six points, which they have elected to call Contentions, summarizing the Argument and hereinafter have set forth the additional point that the question before this Court is not moot.

These seven points or contentions are hereafter recited, followed by the argument and citations in support of each.

These contentions pertain: (1) to the jurisdiction; (2) to res adjudicata; (3) to the exercise of police power; (4) to contractual rights of interveners; (5) to failure of appellant's proof; (6) to waiver and estoppel; (7) to substantial interest of interveners.

Contentions 1, 2, 3 and 5 are impersonal and formal, while 4, 6 and 7 have reference to the material and pecuniary interests of the intervening depositors.

The appellees, Weaver et al., and the intervening appellee, Stebbins, have no personal pecuniary interest in the result of the action.

APPELLEES' CONTENTION NUMBER 1

THAT THE DECISION OF THE STATE COURT IS BASED ON FEDERAL AND NON-FEDERAL QUESTIONS, AND BY REASON OF THE FACT THAT THE DECISION OF THE FEDERAL QUESTION WAS NOT NECESSARY TO THE DETERMINATION OF THE CASE, THE SUPREME COURT OF THE UNITED STATES WILL NOT TAKE JURISDICTION.

Appellees respectfully suggest that where the decision of the lower court, of which complaint is made, was based partly on Federal and partly on non-Federal questions, if the non-Federal question would control the case, the Supreme Court of the United States will not accept jurisdiction although the Federal question is involved, if the decision on the non-Federal question is reasonably supported by the record.

Adams vs. Russell, 229 U. S. 353.

People ex rel Doyle vs. Atwell, 261. U. S. 590.

Arkansas Southern Ry. Co. vs. German National Bank, 207 U. S. 270.

Numerous other cases might be cited to sustain this position.

In the instant case, the State Supreme Court reversed the decision of the lower court, and after devoting a considerable portion of its opinion to a consideration of the acts and conduct of the banks in soliciting, and maintaining deposits, found that the banks had waived their right to question the constitutionality of the Act of which they had benefit.

Abie State Bank vs. Weaver, 119 Neb. 153.

The decision of the State Court to the effect that the banks have waived the right to question the constitutionality of the Act clearly brings this case within the rule announced in numerous cases decided by this Court. The decision of the Federal question as to the constitutionality of the Act was in no manner necessary to the decision of the case.

Under the rule in this Court where State statutes require a decision of the highest State Court to be in writing, stating the grounds of the decision, the Supreme Court may, in determining its jurisdiction, examine the written and recorded opinion to ascertain the grounds of the judgment of the State Court.

Thompson vs. Maxwell Land Grant & Railway Co., 168 U. S. 451.

Dibble vs. Bellingham Bay Land Co., 163 U. S. 63.

Under the statutes of the State of Nebraska, the Supreme Court is required to render its opinion of reversal in writing and to state the grounds of the decision. Sections 1074-1075, Comp. St., Nebr., 1922.

Appellant concedes that the rule governing the opinions of the Supreme Court of Nebraska, is that the syllabus is prepared by the court and that the syllabus sets forth the decision of the court on the matter at issue.

But the appellant contends that the opinion and the syllabus are not in accord. It would seem clear that after the court had reviewed the evidence affecting waiver in the opinion, that the section of the syllabus which states that "the Banks should not be heard in a proper case to make complaint" would apply to the opinion in the case as the court would have no occasion to record an opinion in the syllabus which had no application to the facts and findings set forth in the body of the opinion. The syllabus and opinion combined constitute the holding of the court.

It seems clear, by reason of the extended reference in the case as to waiver, that not only the Justice who wrote the opinion, but the entire court rested the decision, at least in part, on the non-Federal ground of waiver. It was an outstanding issue raised by pleadings and supported by evidence.

The contention in appellant's brief, relative to the adoption by the State Supreme Court of the findings of the lower court, would seem to be based upon a most faulty premise. Under the Nebraska law, Section 9150, Comp. St. Nebr. 1922, the Supreme Court is required on appeal in equity cases to try the case de novo, and while it is true that the trial court did find that the banks had waived their right to question the constitutionality of the Guaranty Fund Act, it also found that public pol-

icy prevented the banks from waiving the right or being stopped to question the constitutionality of the law.

It must be presumed in accordance with the statute that the Supreme Court instead of adopting the finding of the lower court upon the trial de novo made its independent finding of fact in its decision since it reversed the decision of the lower court. It, in fact, did refuse to adopt such findings and from the report of the judgment, it is clear that it had found that the findings of the lower court upon the facts were erroneous. (119 Neb., supra).

The record discloses that the Supreme Court did have a substantial basis for its findings that the banks have waived their right to raise the question of constitutionality, and investigation need not go beyond the statement in the opinion of the court itself to substantiate this fact.

It is shown in the evidence and commented upon by the court that a definite result of increased deposits had been secured by reason of the aggressive action of the banks by advertising the advantages to depositors and the security afforded to depositors in banks by reason of the operation of the Guaranty Fund Act, and that numerous deposits were made and maintained in banks by reason of direct representation to the depositors that their deposits were amply protected under the law.

The Supreme Court of Nebraska, in its opinion, regarded the constitutionality of the Act as having been sufficiently decided, and apparently, having accepted that fact, has said by inference that, even if the Act were unconstitutional, the banks might not question the constitutionality under the facts of the case.

The force of this contention of appellees is more apparent in light of the fact that the constitutionality of the Act had been heretofore passed upon by the Supreme Court of the United States.

Shallenberger vs. First State Bank of Holstein, 219 U. S. 114.

The court in its decision recognized that fact and specifically referred to the case of Noble State Bank vs. Haskell, 219 U. S. 104, and to the reasoning of the court in that case, and the Nebraska Supreme Court recognized that the constitutionality of the Act had been decided and its decision, therefore turned upon the waiver.

This Court has held that where a Federal question which has been raised had been explicitly decided, and where the subject matter of the controversy was not inherently Federal, a writ of error would be dismissed.

Equitable Life Ins. Co. vs. Brown, 187 U. S. 308.
King vs. West Virginia, 216 U. S. 92.

In view of the fact that the non-Federal question alone was sufficient for the determination of this case, and in view of the further fact that the constitutionality of the Act in question has been heretofore determined by this Court, it is submitted that the Court will not take jurisdiction of the case upon this appeal.

APPELLEES' CONTENTION NUMBER 2

THAT THIS PRECISE GUARANTY FUND ACT AND THE ASSESSMENT PROVIDED THEREUNDER HAVE BEEN HELD NOT VIOLATIVE OF ANY PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

It is appellees' contention that the case of Shallenberger vs. First State Bank of Holstein, 219 U. S. 114, directly adjudicates the matter at issue in this case and the Shallenberger case is based upon the decision in

Noble State Bank vs. Haskell, 219 U. S. 104 and 219 U. S. 575.

Extended comment is made throughout the briefs herein to the decision in the Noble case, and it is true that the Noble case is regarded as a definite decision of the constitutionality of a Guaranty Fund Law generally, and the Shallenberger case as an adjudication of the constitutionality of the Nebraska Guaranty Fund Law specifically.

It is interesting to observe that, although guaranty fund laws have been enacted in various states and have been subject to attack in the courts, in no instance has any court of last resort held the law unconstitutional. Without reference to the result of the operation of the law, the right of the State to regulate for itself the business of banking has been constantly recognized.

In light of the fact that such extended comment has been made upon the Noble case in the briefs, it will suffice if appellees comment only briefly upon it.

Appellant's reasoning to the effect that the rule in the Noble case is not applicable at the present time and under present conditions of the banks, would, it seems to appellees, refute itself. This Act has been in force and effect in the State of Nebraska for many years and apparently has accomplished the result which was intended. The effect of the operation of the law has been to stabilize the business of banking in the State. It has increased the deposits in the State banks. It has for many years caused the depositors in failed banks to be paid the amount of their deposits in full within a short time after the failure of the bank. It has conferred a direct benefit upon the entire community.

It is disclosed by the record that the Guaranty Fund Law is not the cause of any asserted unsatisfactory condition of the banks, but that in fact the condition claimed has been caused generally by matters entirely

within control of the persons managing the banks. Certainly, it cannot be contended that incompetency, dishonesty or bad banking practices can be laid at the door of the Guaranty Fund Act.

Appellant shows that some of the banks in the State are in a condition verging upon insolvency and that many others cannot earn dividends. It is also shown that many of the banks, which joined as plaintiffs, are in a good condition and are earning dividends, and can without detriment pay the assessments under the Act. Moreover many banks did not join in the action to resist such payment.

Apparently, the reasoning of appellant is, therefore, that by reason of the existence of an economic condition, which it must be presumed is only temporary, the operation of the Act, in so far as the assessments are concerned, is rendered unconstitutional, and therefore the rule in the decided cases has no present application.

In considering the Noble and Shallenberger cases, as shown by the opinion in the Noble case, this Court had before it those facts which were properly set forth in the petitions in those cases, and there considered the same phases of the case now presented. It is true that the Court in its opinion made reference to an "insignificant taking" as being justified, even where its immediate purpose is apparently a private use, but it is interesting to observe that the "insignificant taking" referred to in the Noble case was double the taking complained of in the instant case.

Appellant contends that the decision in the Noble case was purely academic, and that the Court inferentially permitted the Legislature to speculate as to the result of the operation of the Act but now, the Act having been in force and effect, the results attained are before the Court.

The decision of the Court in the Noble case was most definite. The Act and the assessments provided there-

under were held to be a proper exercise of the police power of the State, and the Court found that the assessments provided for by the Act not confiscatory. It is suggested by appellees that nothing has been shown on the part of appellant which would remove the present operation of the Act beyond the rule laid down in the Noble case.

It is disclosed in the record in the instant case that the evidence is direct to the effect that properly managed banks with adequate capital can pay the present assessment without embarrassment, which result in no way is in conflict with the decision of the Noble case. However, appellant nows asks the Court to declare the law unconstitutional because of the fact that certain, but not all banking institutions, cannot operate at a profit during the current deflation period, and the Abie State Bank does not offer evidence to advise the Court that it is either properly managed or is provided with adequate capital, or that there was banking business to sustain it; nor does it show that it cannot pay the Guaranty Fund assessment, although the record does disclose by reason of its location with its limited deposits and loans, and its method and cost of doing business, it does not operate at a profit.

Conceding the law to be that an Act under one state of facts might be proper, and under another improper, so far as its constitutionality is concerned, appellees respectfully submit that where the present condition is in a large measure brought about by the acts and conduct of the person complaining of the Act, this condition provides no cogent argument to induce the Court to change a former decision and now declare the Act unconstitutional. Certainly there is no reason for such holding where the record is destitute of evidence that any bank would have adequate earnings except for the assessment complained of.

The action of appellant is a direct attack upon the Act itself, although this attack is apparently directed

only against the special assessments. Nowhere does appellant in its brief concede that any assessment under the Bank Guaranty Fund Act would be constitutional. No distinction is made between prosperous banks and failing banks. Appellant would have the Act held unconstitutional as to both classes.

The decision in Noble vs. Haskell, supra, has been followed in Assaria State Bank vs. Dolly, 219 U. S. 121, and it has been recognized as a rule of law by the courts in the various states.

The fact that the decision of these cases has entered into the business transactions of the State, and has been acted upon as a rule of contract and property, appellees believe, gives a basis for their contention that the constitutionality of the Guaranty Fund Act has been adjudicated, and such adjudication has been conceded and accepted and acted upon by all parties affected.

This Court has frequently taken into consideration long acquiescence in constitutionality of the statute and the fact that a rule of property has developed as a result of its decision.

Elzaburu vs. Chaves, 239 U. S. 283.
McDougal vs. McKay, 237 U. S. 372.
Reynolds vs. Fewell, 236 U. S. 58.
Truskett vs. Closser, 236 U. S. 223.

Hereinafter appellees will make reference to numerous decisions of the Nebraska Supreme Court in which the controlling decision in the case at bar has been cited and which interpret the various features of the Act in derogation of previous settled law. The banks as well as depositors have invoked the action of the courts and received the benefits of numerous decisions premised upon the constitutionality of the Act.

The cases, 87 in number, were decided by the Supreme Court of the State of Nebraska in which the Bank

Guaranty Fund Act was construed. A brief reference to the matters decided in the various cases is set out in Appendix "A," which is attached to this brief.

Further argument will be addressed to the condition of the banks of the State of Nebraska, as disclosed by the record, in the argument under appellees' contention relative to failure of proof on the part of the banks in this case.

It is respectfully submitted under the decisions of the Noble vs. Haskell and Shallenberger vs. Bank cases, that the matter in issue in this case has been directly adjudicated and that the constitutionality of the Depositors Guaranty Fund Act of the State of Nebraska is res adjudicata.

APPELLEES' CONTENTION NUMBER 3

THAT THE LEGISLATURE HAS THE RIGHT BY PROPER REGULATORY MEASURE TO CONTROL THE QUASI PUBLIC BUSINESS OF BANKING WITHIN THE STATE, AND THAT THE COURT SHOULD NOT INTERFERE WITH THE EXERCISE OF THIS LEGISLATIVE FUNCTION.

It is a recognized rule of law that the police power of the State extends to the regulation of banking business.

Noble State Bank vs. Haskell, 219 U. S. 104, 219 U. S. 575.

Shallenberger vs. First State Bank of Holstein, 219 U. S. 114.

Engel vs. O'Malley, 219 U. S. 128.

The basis for the exercise of the police power of the State is for "the greatest welfare of the people," and the cases cited by Mr. Justice Holmes in the Noble case are clearly illustrative of the attitude of the Supreme Court of the United States in cases where the Legislature has clearly considered the public benefit, and where the Act will reasonably accomplish the result intended.

Bacon vs. Walker, 204 U. S. 311.
Offield vs. Railway Company, 203 U. S. 372.
Strickley vs. Ore Mining Co., 200 U. S. 527.

The business of banking is of such vital importance in the world of modern business that local communities are most seriously injured by losses due to failures. By reason of the present method of conducting business, banks have become the necessary agency for the clearance of almost every business transaction and the current funds of the community flow through the banks, and any cause which impedes the flow necessarily upsets the business equilibrium and directly affects every citizen. Because of the importance to the community it is clearly proper that the Legislature should take steps to attempt to insure against this loss and assure the consequent stability.

The failure of the Guaranty Fund Act in various states, adverted to by the appellant in its brief, in the opinion of appellees, gives no weight to the contention that the Act is an improper exercise of the police power. The history of the improper administration of the Act, the amendments to it obtained by the bankers resulting in destroying its effectiveness, and the lack of support by the bankers, except when operating to their benefit, are matters that should be considered by the Court before it takes cognizance of appellant's conclusion that the Act has not proven satisfactory wherever tried—should such conclusion seem material.

The refusal of the courts to interfere with this proper legislative function has been definitely recognized.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112
Strickley vs. Highland Boy Gold Mining Co., 200 U. S. 527.

The courts, wherever possible, are inclined to sustain the holding of the local courts with reference to validity of a statute for the reason that the local courts are presumed to know and appreciate local conditions and the results to be obtained from the operation of the Act.

Clark vs. Nash, 198 U. S. 361.

The Court will favor the construction which will uphold the statute unless it is plainly in violation of the provisions of the constitution.

U. S. vs. Standard Brewery, 251 U. S. 210.
Texas vs. Eastern Texas R. Co., 258 U. S. 204.
Bratton vs. Chandler, 260 U. S. 110.

Banking under section 7983 Comp. St. Nebraska 1922 is declared to be quasi public business.

The Act under consideration here has bestowed direct and indirect benefits on the public of the State of Nebraska, and in spite of the opinion of economists and bankers as to the faults of the legislation, its results must be measured locally. Lack of wisdom on the part of the Legislature in enacting the law, in the view of the court, is not a ground for interference by such court with this purely legislative function.

No evidence has been produced on the part of the banks which affects the constitutionality of the Act or the assessments levied under the Act, in so far as present existing conditions are concerned, and the mere fact that a period of deflation, following a period of inflation and speculation, has affected the banks to their detriment cannot, in the opinion of appellees, take from the State the right to regulate its banking business and impose proper charges in carrying out that purpose. The money of appellees was received and invested during such periods of inflation and it must be repaid irrespective of changed conditions.

The statute in this case had been in full force and effect for nearly twenty years at the time of the commencement of this action, and its constitutionality had been adjudicated. (219 U. S. 114, supra.).

Appellees submit that the Act has a proper relation to the public welfare as shown by the result of its operation in the State, and it has been of definite public benefit.

The Act is not in contravention of fundamental law, and certainly is not against public policy, and the presumptions are in favor of the validity of the Act. (119 Nebr. 153, supra.).

Appellant admits that the determination of the benefits of the Guaranty Fund Act presents an economic question. If the propriety of the Act must be resolved upon a discussion of business economics then, clearly, the Legislature has the right to maintain this Act, and the court should not take action to affect the operation of the law where its jurisdiction is invoked by reason of the appellant's economic argument against the wisdom of the special assessments complained of.

Engle vs. O'Malley, supra.
Noble State Bank vs. Haskell, supra.

Appellant insists as a requisite to the proper exercise of the police power, where the Legislature attempts by statute to take a portion of the property of the citizens for the public use, that the enactment must bear substantial relation to the original object and purpose, and that in this case it is shown that instead of accomplishing the purpose for which the Act was intended, it, in fact, defeats that purpose.

The expressed purpose of the Act was "a Guaranty Fund for the protection of depositors in banks."

Section 8024, Comp. St. Nebr., 1922.

The Legislature further provided that in case of the insolvency of a bank, the claims of the depositors should be paid immediately out of the cash on hand, and if that were not sufficient, the amount of depositors' claims in excess of cash on hand should be paid from the Guaranty Fund.

Section 8033, Rev. St. of Nebr., 1922.

We must concede that the purpose of the Legislature in passing this law was to provide a safeguard for the depositors in banks. This of itself might, it is true, be regarded as purely a private purpose, but we recognize that the Legislature had in mind a definite result to the public to be attained through the operation of the Act, and that was the stability of the banking system. This result we submit, as disclosed by the record, has been attained through an experience of seventeen years with the operation of the Act. The banking situation in the State of Nebraska has been definitely stabilized through the operation of the Act. Deposits in the State banks increased, and the serious results of business depression, which were in evidence in neighboring states, were prevented.

It may be admitted that the condition of many banks in the State of Nebraska is most unsatisfactory. However, that is not the fault of the State of Nebraska. This result has not been caused by the Guaranty Fund Act, but is due in part at least to the fault of the persons in charge of the institutions, which now complain, that because of their financial condition, they cannot pay the special assessment under the Act.

It does not appear consistent that these banks should be heard to complain and be permitted to use their own lack of success in business, to now defeat the Act when liability to depositors has accrued thereunder.

It may be conceded that depositors in solvent going banks have little need of protection. While it is possible that such a bank might be closed by unexpected withdrawals of current funds there will be little or no possibility of loss to the depositors in such cases. The depositors, who need protection, are those in banks which close by reason of the depositors money being unwisely loaned with resulting losses in assets, and these interveners are before the Court in the position of such depositors. They urge the return of their money through continuation of the special assessments for that purpose. The assessments complained of here clearly have a reasonable relation to the end expressed in the statute. They provide funds for the payment of depositors whose deposits were made at the time the banks and the people of the State were receiving the benefit of the Act.

The stability of the banks was assured until the commencement of this action on December 21, 1928. (Message—Gov. Adam McMullen, Rec. 434-437).

The depositors could have no knowledge of the general condition of the banks and in fact did have no such

knowledge until the startling allegations set forth in the banks' petition became public property when filed on said Dec. 21, 1928. If the knowledge did exist that the assessments could not or would not be paid, interveners most certainly would not have made nor maintained their deposits.

Appellant has devoted a portion of its brief to the proposition that the Guaranty Fund Act is in violation of the charter agreement between the State and the banks.

Under the constitution and laws of this State special charters to corporation, excepting charitable, educational, penal and reformatory, are prohibited and all banking corporations in the State of Nebraska are incorporated by general law which "may be altered from time to time or repealed." The amendment by the Constitutional Convention of 1920 made no change in this regard.

> Const. Neb. 1920, Art. XII, Sec. I.
> Const. Neb. 1875, Art. XIb, Sec. I.
> Lincoln Street Railway Company vs. City of Lincoln, 61 Neb. 109, Syl. III.

The passage of the Act was, therefore, within the power of the Legislature of Nebraska, as a proper exercise of its police power.

In so far as the assessments complained of are concerned, they were clearly within the right of the Legislature, and the banks called upon to pay these assessments should not be permitted to accomplish the purpose of this action when they had solely within their power the means to prevent, and theirs was the duty to foresee, the condition which is the basis for their contention of present unconstitutionality. The depositors in no manner contributed to that condition. Their deposits were made and maintained in reliance upon the protection the Act afforded them.

APPELLEES' CONTENTION NO. 4

THAT THE ACT PRESCRIBED A CONTRACT BETWEEN THE BANKS AND THE DEPOSITORS AND UNDER THIS CONTRACT RIGHTS OF THE INTERVENERS HAVE ACCRUED.

A contract is created when a depositor places money in the bank in the ordinary course of business. This contract while not express is implied in fact and under this implied contract the bank agrees and is obligated to repay the amount of the deposit to the depositor upon demand. On certificates of deposit the contract is express.

Citizens State Bank vs. Worden, 95 Neb. 53.

Under the Guaranty Fund Act when a deposit is made another contract is created. The terms of this contract are expressed in the law. Under this contract the banks which then accepted deposits agreed to and were obligated to make payment of certain assessments, based on their deposits, for the protection of depositors in any State bank which might be unable itself to fulfill its own contracts.

The case of Lankford vs. Platte Iron Works, 235 U. S. 461, has been cited and referred to in the brief of appellees, Weaver et al., in this case. The dissenting opinion of Justice Pitney is quoted at length therein at pp. 144-145 and in the said opinion is set forth a definite expression that the entire Court agrees,

> "that the act prescribed a contract, and one of wide importance between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the

contract be made. Not only has the state obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made."

Unless the finding of the Court as to prescribed contract is entirely set aside, it is difficult to conceive a more direct placement of rights in the depositors and obligations upon the banks than is contained in the above quotation.

Conceding that the law does prescribe a contract the question arises,—What is the contract and what are the obligations imposed by it?

An investigation of the Act and the method of its operation can lead only to the conclusion that the contract prescribed is most definite and certain. Under it the banks are required as a condition precedent to the lawful conduct of their business to perform certain acts among which is to make a report of the amount of their deposits and they are required to pay a regular semi-annual assessment of 1/10 of 1% of the average deposits and such special assessments as may be levied by the designated board. The exact amount of this special assessment is not prescribed but the Legislature did fix a limit beyond which the body levying the assessment might not go (1/2 of 1% of the average deposits annually).

The purpose of both the regular and special assessments is definitely set forth in the Act. That purpose is the protection of the depositors in banks which might fail, so that funds may be available in the event of such failure to repay the depositors of that bank the full amount entrusted.

The State as such has no financial interest in the Fund created by the payment of the assessments.

This contract prescribed is collateral to the original contract between banks and the depositors for the repayment of the deposits in full.

The Supreme Court of the State of Nebraska has placed its interpretation upon this contractual relationship in many cases, among which is Rogers vs. National Surety Company, 116 Neb. 170, Nov. 10, 1927, page 178, wherein the court by unanimous opinion states:

> "In view of the statutory provision, the term 'Depositors' Guaranty Fund' is no misnomer and functions strictly as a 'guarantor' as the nature of its obligations is strictly secondary."

The Nebraska Court in the same case has construed this contractual relationship, as follows:

> ". . . . . whereas the Guaranty Fund is bound by a statutory, cumulative, collateral obligation by which it, in effect, is bound that the principal (the bank) is able to, and will, perform the contract and that if the principal defaults the Guaranty Fund, after statutory steps have been taken, must pay to the extent provided by law."

In view of the decision of this case it is clear that the appellant bank and all other going banks are guarantors of the obligations of the failed banks which were the principals to the original contract of deposit that exists in favor of the interveners and other depositors similarly situated. The terms of the contract of guarantyship which has been recognized by the Court in the case cited can not be abridged while obligations which accrued thereunder remain unpaid.

These interveners as depositors in failed banks are parties to the prescribed contract and have a pecuniary interest in the payment of the assessments by the banks, and they have the right to demand that the payment of these assessments be made to the Fund by the banks until all accrued liabilities are liquidated.

The courts of the State of Nebraska have in many other cases construed the Guaranty Fund Act and have recognized the existence of a contract between the banks and their depositors and under these holdings there has been developed a rule of property which has had recognition in this State for many years.

A notation of the number of the case and a brief reference to the matters determined in such cases is set out in appendix "A" which is attached to this brief.

A consideration of the entire Act (Neb. Sess. L. 1923 P. 438), clearly demonstrates the existence of such contract and makes clear the respective rights and obligations of the banks and the depositors.

The banks accepted and retained the deposits of the interveners which were made while the Act, which required payment of the special assessments, was in full force and effect. The banks for the purpose of increasing their deposits had held out to the public generally and to the appellees particularly the advantages of the Act, and the fact that their deposits were thus protected.

The rights of these interveners as depositors in failed banks accrued when their deposits were originally made and exist as long as they maintained their deposits in a State bank. They were entitled to believe that the assessments would be levied and promptly paid by the banks in accordance with law.

The rights of interveners became vested upon the adjudication of their claims, after the bank, in which the deposits were made, failed and when that bank refused or was unable to carry out its original contract.

Appellant in its brief denies the existence of contractual rights and obligations and cites the case of Wirtz vs. Nestos, 51 N. D. 603 and Standard Oil Company vs. Engel, 55 N. D. 163 to support its contention.

The case of Standard Oil Company vs. Engel merely held that the Commission created under a Bank Guaranty Act was the legal body in which was reposed the power to pass upon claims and mandamus to compel an allowance of such claims was denied because of that discretionary power.

In the Wirtz vs. Nestos case a depositor sought to compel the Guaranty Fund Commission to pay his claim first out of the money on hand and it was shown that the claim had not been approved as required by the Act. The rights of the depositor to compel action was denied. The case decides only that the discretionary power of the board as to manner of payment of claims could not be interfered with by a depositor. The case is not in point despite the dictum referred to in the brief of appellant although the Court stated that the claim of a depositor which had not been adjudicated did not create a vested right in the fund. It also held with reference to a depositor with a claim against the Guaranty Fund:

> "Whether approval of a claim as guaranteed by the State Examiner would have created a vested right which the Legislature could not have disturbed by subsequent Legislature is not decided."

Appellant insists that the intention of the Legislature was to provide protection for depositors in sound

going banks and that the first and foremost duty of solvent banks was to their present depositors. This we contend is immaterial to a determination of the issues here involved.

The rights of interveners in this case must be decided in accordance with the rules of contract. This is quite in accord with the agreement of this entire Court in reference to contractual rights under a Guaranty Fund Act as expressed in the dissenting opinion of Mr. Justice Pitney in the case of Lankford vs. Platte Iron Works, supra.

The Guaranty Fund created by the Act is the property of the banks themselves. The law requires that the Fund must be maintained by the payment of the assessments.

Unless the right to enforce payment of the assessment exists the prescribed contract will be a nullity.

Therefore it is inconsistent for appellant to contend that the banks have no contractual obligation to pay the assessments solely because these now have become burdensome.

If under the Act rights of depositors have accrued, corresponding obligations are imposed on the banks to maintain the Guaranty Fund to the extent made possible by payment of all assessments prescribed by the Act so long as accrued liability exists.

In this case it is the contention of appellees that even conceding for the purpose of argument that the constitutionality of the Act may properly be questioned, for the reason that it now serves no public purpose, the fact of the Act having been held constitutional and having been in force and effect for many years and rights

having accrued under it, will control the determination of this matter and that even if it is shown that the operation of the Act causes injury to the operating banks, courts will not permit the abrogation of the contractual rights accrued under it by those who had accepted the Act as constitutional.

The right of depositors to enforce their contract has foundation in equity by reason of the fact there is a definite moral obligation upon the parties bound.

The State upon its part has undertaken to levy the assessments under the Act and to enforce their payment into the Fund for the benefit of those entitled to collect from the Fund. This undertaking had created a moral obligation upon the State.

The case of United States vs. Realty Company 163 U. S. 427 recognizes the force and effect of this moral obligation.

In that case persons entitled to collect bounty for manufacturing sugar, under a statute held unconstitutional, were permitted to establish their right to the collection of such bounty in spite of the unconstitutionality of the statute under which the bounty was payable. In answer to the objection that no equities could be recognized which must necessarily be created under the constitutional statute, this Court said,

> "Under such circumstances can it be said the plaintiffs in these suits, and persons situated like them, were bound to know this law was and would be pronounced unconstitutional and that no right could be acquired under it? * * * * * We are of the opinion that these parties situated as were the plaintiffs in these actions acquired claims upon the government of an equitable, moral or honorary nature."

The court recognized that such a claim was binding and enforceable.

The situation in the instant case in the opinion of appellees discloses additional equities in favor of interveners which were not present in the Sugar Bounty case.

In this case the statute has been held constitutional by the Supreme Court of the United States. That fact was admitted by the bankers and was held out as an inducement to all depositors to place their money in State banks. The advantages of the law and its direct public benefit were proclaimed by the bankers and they declared that the Act had stabilized the business of banking in Nebraska.

The interveners believed that the Act was constitutional and made their deposits in that belief, and no knowledge had come to the interveners of the purpose of the banks to question the validity of the Act until the commencement of this action.

The contract prescribed by the Act has matured in so far as interveners are concerned. The measure of liabilities of the going banks to interveners on account of the operation of the Act has been determined. The bankers now admit knowledge of the extent of their liabilities under the Act but deny the right to enforce it.

So appellees contend that the result of the present or future operation of the law, in so far as it affects present or future depositors, should not be considered by the Court, nor should the Court in light of accrued rights of interveners, under all the facts shown in the evidence, consider the relation of the Act to present public welfare, as controlling.

The Court might, however, properly consider the discharge of the moral obligation of the State as having a direct and substantial relation to the public welfare.

The rights of interveners and depositors in failed banks which have accrued under the Act are paramount and superior to the right of the other parties to the prescribed contract to question the constitutionality of the Act.

One who attempts to relieve himself of the burden of his contract by urging that the Act does not serve a public purpose, receives no support for his contention merely by reason of the fact that conditions have arisen which make the carrying out of his contract burdensome. Particularly is this true where rights have accrued under the contract made.

It has been held where the rates of a street car company were found to be confiscatory in that they failed to return proper compensation for the service rendered, that the company was bound to adhere to the rates, because of the existence of a special specific contract limiting the maximum rate.

Georgia Power Co. vs. City of Decatur, 281 U. S. 505.

Clearly it would seem that the claim of appellees for the enforcement of their rights accrued under the prescribed contract is supported by the equities in the case and if further consideration is needed to strengthen the position of interveners the moral obligation of the banks under the record in this case supplies this consideration.

Interveners have a substantial financial interest in this case and they submit that the rights of the depositors in failed banks and the obligations of the banks of the State of Nebraska under the prescribed contract and upon equitable and moral considerations should be recognized and defined by the Court. Appellees respectfully submit if the Court shall find that there is a contract between interveners and the banks and that interveners have accrued rights under this contract, although it may be decided by reason of present conditions that the Act has no substantial relation to the public welfare, nevertheless the accrued rights of interveners should be recognized from the record in this case and the enforcement of these rights made possible.

From all facts and circumstances in this case, it would seem impossible to deduce reasoning which would permit the banks to put themselves beyond the law and avoid the obligations of their contracts, merely because they now contend that the payment of these obligations has become burdensome to them. Nor is it possible under all the facts and circumstances shown in the record to evolve a logical theory under which the rights of interveners as depositors in the failed banks can be destroyed.

APPELLEES' CONTENTION NO. 5

THAT THE BANKS HAVE FAILED TO SUSTAIN THEIR CONTENTION THAT THE SPECIAL ASSESSMENT PROVIDED IN THE ACT, AS A MATTER OF FACT, IS CONFISCATORY, OR THAT IT DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

It is asserted by the appellant in this case that the special assessment provided for in the Guaranty Fund Act is confiscatory and that it does not bear a substantial relation to the public interest and that therefore the

Act, so far as the special assessment is concerned, violates the Fourteenth Amendment of the Constitution of the United States.

The burden of proof is upon the one who attacks the enactment of a legislature upon the grounds of unconstitutionality to show that the Act would necessarily deny him just compensation and deprive him of his property without due process of law.

Groesbeck vs. Duluth S. S. & R. Co., 250 U. S. 607.
Knott vs. C. B. & Q. Ry. Co. 230 U. S. 474.
Simpson vs. Shepherd, 230 U. S. 352.
Aetna Ins. Co. vs. Hyde, 275 U. S. 440.

Appellees contend that, even if the rule of proof were narrowed to the limits of the rule which is applied in utility rate cases, an examination of the evidence in this case will most conclusively demonstrate the complete failure of proof on the part of the appellant.

The evidence produced upon the trial of the case, in so far as it applies to this contention, consisted, for the most part, of oral testimony of the employees of the department in charge of banking and certain tabulations prepared by auditors employed by appellant. There were certain conclusions shown by oral testimony to have been derived from these tabulations. The tabulations were prepared by grouping various banks, selected arbitrarily in light of earnings, or lack of earnings, in order to demonstrate that a number of banks were unable to earn dividends and were being operated at a loss. Other tabulations in reference to the condition of the banks were restricted to certain banks of the State selected by the auditor preparing them to serve some arbitrary purpose and it is evident that these tabulations were prepared in an attempt to support the

contention of appellant rather than to show facts with regard to the condition and manner of operation of each of the banks of the State and the effect of the assessments upon it.

The oral testimony, with the exception of the evidence given by the officers of three large and successful banks and the cashier of appellant bank consisted to a large extent of guesses and speculations as to the condition of the banks and the Guaranty Fund, and the opinions of witnesses as to the economic failure of the Guaranty Fund.

From the maze of evidence in the case the following facts may be deduced even if not regarded as proven.

Many of the seven hundred thirty eight banks in the State are in a most unsatisfactory condition. A great quantity of worthless assets has been accumulated in the banks. These worthless assets will represent great losses to the banks and they originated during the period of inflation and speculation which accrued after the war. "Charge offs" will reduce the assets of the banks and will prevent them from earning satisfactory dividends for sometime. A number of the banks are earning satisfactory dividends and others are showing excessive earnings. All banks made money from 1910 to 1920, and most banks paid dividends until a short time before the trial. The condition of the banks is much better now than it was in 1923. The assessments under the Act have not of themselves caused any injury to the banks. Properly operated banks with adequate capital can pay the assessments and earn dividends. Incompetency, speculation, bad banking practices, and betrayal of trust were contributing factors in the failure of many of the banks in the past, and there is evidence of incompetency and bad banking practices in many of the going banks.

The Guaranty Fund Act stabilized the banking business of the State, caused a substantial increase in deposits, prevented runs on banks and protected the State from the banking disasters which had occurred in neighboring States.

All of the foregoing evidence was general. There was no reference to banks in particular classes selected in the proper light of their location, capital and potential possibilities.

As to particular banks the evidence is limited to four. As to these it is shown that three large banks of the State are operated at a profit and can pay the assessments. Appellant bank is shown to be located in a small town where there was strong competition and where they had earned large dividends in the past but no dividends had been paid for two years. This bank was showing no substantial profit from present operations. It has accumulated among its assets "bad paper" which could not be charged off because the earnings were not sufficient to balance the expense of operation.

There is no evidence in the record as to the effect of the assessment on any particular bank which was operated in accordance with good banking practices and which was provided with adequate capital and which was located where it would have a potential possibility of success. The record is silent as to the correct relation of expense to income in any phase of bank operation in the State.

There is no evidence that any bank in the State was operated in accordance with good banking practice.

Nevertheless appellant rests his case upon these facts, and under the rules laid down in the rate cases cited this evidence is insufficient to meet the requirement of the rule of proof.

Appellant submits that the burden is on the one seeking the relief in a case of this kind to bring forward and satisfactorily prove the invalidating facts.

Aetna Ins. Co. vs. Hyde 275 U. S. 440.
Groesbeck vs. Duluth S. S. & R. Co., 250 U. S. 607.
Knott vs. C. B. & Q. Ry. Co., 230 U. S. 474.

However it is not conceded by appellees that the propriety of the Act which is challenged in this case is subject to the same rule which applies in rate cases.

The assessments under the Act in this case are made in the exercise of the police power of the State, and unless the exercise of this power is arbitrary and unreasonable and is not designed to accomplish a legitimate public purpose, it will be held valid.

Mutual Loan Company vs. Martell 222 U. S. 225.

The discretion of the Legislature is very large both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests.

Manigault vs. Springs 199 U. S. 473.
Lawton vs. Steele 152 U. S. 133.
Powell vs. Pennsylvania 127 U. S. 678.
Gitlow vs. New York 268 U. S. 652.

The mere conflict of opinion does not bring within the range of judicial cognizance a statute enacted under the police power.

Erie Ry. Co. vs. Williams 233 U. S. 685.

Appellees submit, even if proof in this case is given its most liberal interpretation and if it then is tested by the most liberal rule the record clearly discloses

complete failure on part of appellant to prove the facts necessary to sustain its case.

A case recently decided by this Court sets forth an exposition of the ruling of this Court as to the requirements of pleading and proof in a case of this sort.

Aetna Life Ins. Co. vs. Hyde 275 U. S. 440.

In this case a Missouri Statute permitted the Insurance Commissioner, for the purpose of fixing rates, to group the aggregate profit of companies to determine an adequate rate and to fix a proper rate. Certain Insurance Companies objected to the rate thus fixed and claimed that it was confiscatory and repugnant to the due process clause of the Fourteenth Amendment. In the opinion the Court said:

> "No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. (Citing Supervisors vs. Stanley, 105 U. S. 305; Heald vs. D. of C., 250 U. S. 20 114). As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others. But the latter have no constitutional rights to prevent their enforcement against the former. The Fourteenth Amendment does not protect against competition. Moreover, aggregate collections sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts on insurance written by it. It has never been and cannot reasonably be held that the State made rates violate the 14th Amendment, merely because the aggregate collec-

tions are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business, * * * * * "

Further the Court held:

"and the complaint fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies."

Another case decided by this Court affirming decision of the District Court of the United States for the District of Nebraska is in point.

Tagg Brothers & Moorhead vs. United States
280 U. S. 420 Affirming.

Tagg Brothers & Moorhead vs. United States
29 Fed. (2nd) 750.

Another recently decided case illustrates the rule.

Beaumont, S. L. & W. Ry. Co. vs. United States
(November 24th., 1930) 31 Sup. Ct. Rep. 1.

The original petition filed in the case at bar listed 559 banks as plaintiffs and admitted that 180 of the State banks did not join in the action. The appeal in this case is taken only by the Abie State bank.

Appellees respectfully submit to the Court that in this case because the appeal has been taken only by the Abie State Bank and in its own behalf it is proper now to view the record in this case in light of that fact

An examination of the evidence introduced on behalf of the Abie State Bank will certainly not bring it within the rule laid down in the cases cited. The evidence shows, beyond doubt, the bank by reason of its location, competition, amount of its business, its potential and actual income and its fixed expense of doing business cannot profitably operate. It is not shown that other banks of this class are being operated in the same manner, or that they are subject to the same expense of operation. The record negatives the fact of economical and proper operation of the bank. Clearly appellant has not complied with the established rule as to proof in this sort of case.

In view of the record in the case, it is apparent the Abie State Bank has failed to sustain on its own behalf the burden of proof imposed upon it by law so far as its individual condition and operation are concerned, and it has produced no definite and detailed evidence as to any other banks similarly situated which have been affected by the imposition of the Guaranty Fund assessments to the extent that the payment of the assessments amounts to confiscation of their property.

The statement of Mr. Justice Hughes in the decision of Knott vs. C. B. & Q. Ry. Co., 230 U. S. 474, sets forth the controlling rule in this case:

> "Each complainant, in order to succeed in assailing them (rates) must show that as to it the rates are confiscatory."

Two cases recently decided by this Court restate the rule of proof.

Toombs vs. Citizens Bank, 281 U. S. 623.

Corporation Commission of Oklahoma vs. Lowe, 281 U. S. 431.

It is interesting to note there is nothing in the record from which this Court can determine which of the banks of the State are properly managed unless the payment of dividends will be regarded as evidence of proper management, nor is there anything in the record from which the Court may determine as to the banks which have not paid dividends recently, which are properly and efficiently managed and which are not, and the Court can not determine from the record whether the various expense items of the bank were reasonable, proper or otherwise. It is not shown which of the banks in bad condition have been making excessive or unwarranted loans, and which were conducting their business in a proper manner. The record does not disclose which of the banks with impaired capital are managed by competent and honest men, or which have suffered losses by reason of incompetency or dishonesty.

Appellant certainly can not seriously contend the mere fact of the existence, among the assets of the banks of the State of a large amount of questionable assets, acquired by the banks themselves in the ordinary course of their business, supports the theory that the assessments under the Guaranty Fund Act are confiscatory.

Appellees submit there is no evidence in this case to sustain the contention of appellant that the special assessments under the Act are oppressive and and arbitrary.

The only evidence as to the effect of the assessment on the various banks as shown in the record has been commented on by appellees heretofore and further reference will not be made.

The general rule is that the Legislature is the judge as to what laws should be enacted for the protection and welfare of the people.

Mugler vs. Kansas 123 U. S. 623.
House vs. Mayes 219 U. S. 270.

The discretion of the Legislature is large both in determining what the interest of the public require and what means are reasonably necessary for the protection of the public.

Green vs. Frazier 253 U. S. 233.

Appellees contend that upon appellant rest the burden of proof to conclusively prove that the Act does not bear a substantial relation to the public good.

Until such fact is proven beyond reasonable controversy the courts will not interfere with the enactment of the Legislature.

Green vs. Frazier 253 U. S. 233.

The statute is shown to have been effectual for many years for the purpose originally intended and appellant attempts to show that the statute has no present relation to the public welfare by reason of the existence of the deficit in the Fund.

The public is as vitally concerned in the payment of the accrued liabilities because of its effect upon business and the public generally as it is concerned in any right of depositors in solvent banking institutions.

The test as to whether a statute bears substantial relation to public welfare must be made in light of the circumstances surrounding each particular case and in determining this relation of a statute the court must take into consideration all of the facts disclosed by the evidence and the effect of the operation of the Act both as to benefits conferred and obligations imposed and

should seek to determine whether or not rights have accrued under the statute which should under principles of equity and right be protected by the court.

By the enactment and continuation of the statute, the State has imposed upon itself a moral obligation to protect the depositors whose rights have accrued under the operation of the Act.

The public interest may perhaps be as well served by the discharge of the moral obligation owing by the State as by direct and substantial benefits which might be derived by the public from the operation of the Act.

Therefore appellees submit that in view of all of the facts and circumstances in this case the intangible benefit to the public does supply the basis of authority for a continuation of the Act until the rights of interveners have been settled and the obligations to interveners discharged.

This intangible benefit of preservation of the integrity of the State may be quite as sufficient reason for the continuation of the Act as would be a definite substantial or financial benefit.

In view of the record it is submitted that, as to the burden of proof on the question whether or not the special assessments attacked are oppressive and arbitrary and bear no relation to the public welfare, appellant has failed to sustain the burden of proof imposed upon it by the law.

Recognizing the logical requirement that the determination of the case should be made upon all of the facts and circumstances shown in the evidence, if the conclusion to be deduced from the evidence may be tested by the balancing of equities, as it is clear that it properly may be, it will be seen that the equities are with the de-

positors and the banks have placed themselves out of position to invoke the principle that the assessments bear no present relation to public welfare to assist them in sustaining their burden of proof, and enable them to escape the performance of their contract.

It is respectfully submitted that if the evidence in this case is examined in light of the decisions in the cases heretofore cited that the failure of proof on the part of appellant to establish the essential facts which are required to sustain the issue of unconstitutionality is so evident that the case of appellant can not by any hypothesis be sustained.

APPELLEES' CONTENTION NO. 6

THE BANKS HAVE WAIVED THEIR RIGHTS TO QUESTION THE CONSTITUTIONALITY OF THE ACT BY ACCEPTING BENEFITS THEREUNDER OVER A LONG PERIOD OF YEARS, AND SHOULD BE ESTOPPED FROM CONTESTING THE COLLECTION OF THE SPECIAL ASSESSMENT ENACTED TO PAY NET LIABILITIES TO DEPOSITORS ACCRUING UNDER THE ACT.

There are three elements entering into the consideration of this contention:

1. The activities of the banks in sponsoring and procuring the enactment of legislation, which amended the original terms of the Act and affected its operation.

2. The acquiescence by the banks over a long period of years while rights of others were accruing thereunder and the acceptance of those benefits which the Act conferred upon the banks.

3. The overt acts of the banks, under a permissive section of the Statute, in asserting the complete protection afforded depositors in banks which might fail, by means of pamphlets, newspaper articles, signs and and the wording upon all evidence of indebtedness issued by banks to depositors, and the direct representation to interveners and their reliance thereon.

Under the first heading appellees will briefly point out the amendments to the original Act by the Legislature of 1923 (Neb. Sess. Laws 1923, Chap. 191, pp. 438-463). The reduction in the assessment and the transferring from the Department of Trade and Commerce to the Guaranty Fund Commission of important administrative duties, and the provision by which the Commission must be made up exclusively of bankers duly elected by themselves, are important. These enactments were fostered by the State banking fraternity, (Supp. Rec. pp 52-55).

In substance the Act of 1923, supra, made provision: for dividing the State into banking groups; for a duly called election, each bank being entitled to one vote for members for the Commission; for the compulsory appointment by the Governor of the Guaranty Fund Commission made up solely from these representatives; for the complete power of the Commission to engage and discharge all employees and make all rules and regulations necessary for the conduct of its business; to compel the Department of Trade and Commerce to immediately lay before the Guaranty Fund Commission all examiner's reports on all banks delinquent in operation and for operation of any bank by the Guaranty Fund Commission unless its mandate was complied with within sixty days; for an administrative fund to be paid by the banks and providing compensation to the Commissioners; for definition of impaired capital and plenary powers to the Commission over banks reported operating in a manner dangerous to depositors; for pos-

session of assets and the release of any mesne or final process theretofore made; for notice of possession to forestall all liens; for inventory of assets and liabilities of any bank taken over; for management of any failing bank by the Guaranty Fund Commission without regard to its solvency, and the acceptance and maintenance of deposits; for the compulsory assignment of all stock in such banking corporation to the Guaranty Fund Commission, if in their judgment its officers, directors and stockholders are incompetent; for procedure for liquidation; for the appointment of a receiver to be named by the Commission; for penalties for failure to carry out orders of the Commission; for the filing of claims and hearings thereon, and giving depositors priority over all other creditors except taxes; for transferring of all assets to Guaranty Fund Commission; for the issuance of a certificate to banks upon compliance with the terms of the Act; for the Bankers Conservation Fund for the purpose of preventing the closing of banks and permitting an assessment on one-third of one per cent upon all average daily deposits, this fund to belong exclusively to the banks and used to loan money to the Guaranty Fund; Section 8028 is the section provided for a special assessment upon depletion of the Depositors Guaranty Fund and authority to levy up to one per cent of the average daily deposits for the year 1923, but thereafter the levy could not be made to exceed one-half of one per cent in any one year; for the advancement of money by the Bankers Conservation Fund to any bank in the process of liquidation for the purpose of placing it upon sound basis upon the repayment of the sums so advanced with interest; for the sale of any bank and the issuance of stock by the Commission from the stock book to the purchaser; for the sale of the assets of any liquidating bank directly to the Guaranty Fund Commission and the administration of this trust by the purchaser itself; (Sec. 32 Neb. Sess. Laws

1923 and Neb. Sess. Laws 1925, chap. 30, p. 125); for complete report annually by the Commission to each State bank showing earnings, losses, profits, surplus, depreciation in assets, dividends paid, and all other informative data, on all banks under supervision; for penalty for inducing deposits by gift or compensation that would increase the statutory rate of interest on time certificates, which previously was five per-cent and then reduced to four; for the issuance of receiver's certificates and the payment thereof with interest from the Depositors Guaranty Fund.

The Act repealed sections 7987, 7989, 8013, 8028, 8029, 8032, 8033, and 8036 Comp. St. of Neb. 1922, declared an emergency, and became effective April 17, 1923, without executive signature.

It will be seen from a study of this Act of 1923 that its purpose was to give complete power to the bankers over any bank which appeared to be operating its business in such manner that it might become a charge upon the Depositors Guaranty Fund. It gave the Commission complete plenary power to do almost anything that it desired for the protection of such banks including its complete operation, the taking over of its management to the exclusion of its officers, directors and stockholders if conditions warranted, and gave the Guaranty Fund Commission access to the "inside" of all banks which were not complying with the law, and provided that any examiner who failed to report any non-compliance by any bank would be deemed guilty of a felony.

Thus it would seem the Act provided to each State Bank every possible means of information regarding improperly operated banks. By the method of election the banks themselves through their representatives became the sole members of the Guaranty Fund Commission. It gave the State banks of Nebraska complete supervision and control of the situation from April 17,

1923 until after the filing of this action by the banks on December 21, 1928. During that period of time interveners rights accrued.

We call particular attention to the Bankers' Conservation Fund in relation to the part it played in the acceptance and acquiescence of the banks in the terms of the Act. Prior to the enactment of 1923 during 1921 and 1922, $2,500,000.00 was loaned to the Guaranty Fund by the banks and repaid with interest. (Rec. p. 642, Qs. 4189-90). In 1923 and 1924 $2,305,776.93 was advanced to the Guaranty Fund by the banks and repaid with interest. (Rec. p. 665, Qs. 4256-7; Rec. p. 300, Qs. 1618, 1620, 1621, 1627, 1628, and 1629).

It may be noted that the only period in which the full special assessment was levied was during the years 1925, 1926, and 1927, though the special assessment was in force for eighteen years.

These appellees, therefore, conclude that if cash had not been loaned to the Guaranty Fund in order to keep the fund apparently solvent by ostensibly having on hand at all times for eighteen years one per cent of the average daily deposits of all banks, as a reserve, the full assessment would necessarily have been levied. If the full assessment had been levied from 1919 to 1924 instead of borrowing money from the bankers, the deficit in the Guaranty Fund at this time would have been decreased by $2,215,000.00. The banks, we contend, escaped responsibility by their sponsoring this legislation and their activities thereunder. This is a matter of simple arithmetic. (See Exh. 44, Rec. pp 487 and 488; Rec. p. 655, Qs. 4258 and 4259).

The very terms of the amendment as sponsored and procured and acted upon by the banks gave them unlimited authority, and this becomes very material because the record discloses that at the time of the trial

this Guaranty Fund Commission, created at the instance of the bankers in order to give them complete domination, had on hand thirty-nine millions of dollars of assets drawing interest in favor of the Fund. As against this, the record shows approximately twenty-five millions of dollars of unpaid claims of depositors. This status arose almost entirely and these accumulations took place during the operation of the law enacted in 1923. The thirty-nine millions of dollars represents for the most part the cash of depositors entrusted to banks. After it passed the receiving teller's window, the deposit became the property of the bank. The depositor had no further control over it. The bank invested the funds and the investment, whatever it was, became the property of that bank. Upon its failure, because of the unwise investment, these assets became a part of the Guaranty Fund. The representative of the Guaranty Fund Commission, Secretary Peterson, stated that in his estimation these thirty-nine millions of dollars of assets were worth possibly ten millions of dollars. Thus did the depositors' money dwindle after it passed through the receiving teller's window. The management, the control, the sales, the collections, the manipulation and the complete handling of thirty-nine millions of dollars was from 1923 in the hands of the banks through their exclusive representation on the Commission, until the law was changed after this action was started. However, every intervener's deposit was made and his claim matured between April 17, 1923 and Dec. 21, 1928.

Appellees contend that the representation given to the banks by the liberal terms of the 1923 amendment effectually estops the banks today to question the propriety of the levy of the special assessment, and the continuation of the levy of that special assessment until all of the money that passed through the "cage" in the first instance has been repaid to the interveners respectively entitled thereto, in accordance with their adjudicated claims.

Section 7995 Neb. Sess. Laws 1925 re-enacted the previous existing provision for the issuance of a certificate to all banks in the State which had complied with the terms of the Guaranty Fund Act, and these banks by the acceptance of the certificate showing that they had complied with the Act by the payment of their assessments, would be permitted to advertise that their depositors were protected by the Guaranty Fund. This certificate was annually issued to each and every bank in the State during all of the time that the interveners rights were accruing. It could only be issued by a showing that the bank was complying with the Act. The Act gave to the banks ample opportunity for information and knowledge of conditions, and if the officials of banks under such circumstances failed to realize the growing amount of the unpaid deposits and the increasing shrinkage of the assets, the depositors are not to blame. There exists under such condition no valid excuse to escape the continuation of the special assessment until the difference between the face of the deposits and the present value of the assets in the Guaranty Fund is completely eliminated by the continuation of the special assessment.

The banks have thus waived their right by these renewed activities under the Act, from 1923 to 1928, to question the special assessment. The participation by the banks in the procurement of the legislation, which they desired, and their continued activities thereunder effectually substantiate the interveners' defense of waiver and estoppel.

Pierce Oil Co. vs. Phoenix Ref. Co., 259 U. S. 125.
Pierce vs. Somerset Ry. Co., 171 U.S. 641.
Wall vs. Parrott Silver & C. Co., 244 U. S. 407.
Grand Rapids & I. R. Co. vs. Osborne, 193 U. S. 17.
Shepard vs. Barron, 194 U. S. 553.
Daniels vs. Tearney, 142 U. S. 415.

The foregoing cases are illustrative of the applications by the courts of the rule under which one, who had participated in an effort to procure legislation and had secured control of operation under it and who had acquiesced for a long period of time in the enactment by acceptance of benefits thereunder, is estopped to claim that the Act is unconstitutional, because he has waived the right to assert such claim.

The presumption is that for five years each bank in the State of Nebraska voted to maintain the Guaranty Fund Commission by the election of its choice of representative. It was chargeable with knowledge of the law and the power and control vested in that commission thus elected.

In Shepard vs. Barron, supra, the court said:

> "Under some circumstances a party who is illegally assessed may be held to have waived all rights to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and encourage the levy of the tax of which he subsequently complains."

In Grand Rapids I. R. Co. vs. Osborne, supra, the court said:

> "Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body."

In Wall vs. Parrot Silver & C. Co., supra, the court states:

> "They cannot claim the benefits of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

In Pierce vs. Somerset R. Co., supra, the syllabus reads:

> "A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States."

In Pierce Oil Co. vs. Phoenix Ref. Co., supra, the court states:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived, or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right."

And the syllabus reads under the heading that the right to due process of law may be waived:

> "The constitutional right not to be deprived of property without due process of law can be barred, as other rights may be, by deliberate election or by conduct inconsistent with the exercise of such a right."

In Daniels vs. Tearney, supra, the court said:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for

> his benefit of an unconstitutional law, he cannot, in subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect,"

and further on the court quotes from cited cases, in the following language:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration, and repudiate the statute?"

The benefits to the banks were generally, three fold: the increase of deposits estimated at one hundred million dollars; the prevention of "runs on banks," and the consequent resulting stabilization of their business.

Appellees have mentioned a third element of waiver and estoppel which is the overt acts of the banks under a permissive section of the statute, in asserting the complete protection which the Act afforded to depositors in banks that might fail, by pamphlets, newspaper articles, signs and the wording upon the evidence of indebtedness issued by banks to depositors, and the direct representation to interveners and their reliance thereon. The banks took advantage of this permissive statute allowing them to advertise the fact that the deposits in their banks were protected by the Depositors Guaranty Fund. This the banks effectually did in 1926, 1927 and 1928 after they had information about the growing deficit in the Guaranty Fund and the imminent danger of loss to depositors. These facts were kept from depos-

itors. These advertisements ran during the time that interveners' deposits were being made and maintained. Some of said advertisements are set forth in the record (pp. 238 and 239). These are also commented upon and set forth in the brief of appellees, Weaver et al., pp. 28-54 and 164-183.

The compelling statement in all of these advertisements is the admission that there is a contractual relationship, which the banks, over their own signature assert does exist between every depositor and all of the banks; and this contract of mutual protection was by said advertisements proclaimed as the protection that every depositor in every State bank had in the event of failure; that runs upon banks were unknown in Nebraska, and that no depositor in all of the failures that had previously taken place, had ever lost a dollar; that deposits should be made and maintained irrespective of bank solvency. Thus were the contractual rights acknowledged.

In fact, all depositors were paid in full up to November of 1927.

These overt acts had their effect upon the interveners. The signs were displayed on all the banks. This under the statute of course was permissable, not compulsory. Millions of dollars were paid and being paid to depositors in failed banks. The interveners saw these activities and relied upon the integrity of the banks to continue to fulfill the promises made in the published statements which were in no way in conflict with the statute.

The reliance on all these proclamations and upon the Act by the interveners is conclusively proven by the making of their deposits, maintaining them and their resort to the Guaranty Fund for payment.

The publicity given to the petition as filed by the banks in this case on December 21, 1928, was the first sound of warning to reach the ears of these interveners. On that date each and every one of their deposits was in the hand of either the Guaranty Fund Commission or banks being operated under receivership, and they were helpless to make any move to protect their rights, except to file a petition of intervention in the case and call upon the judicial branch of the Government to aid them in the enforcement of their rights. The Guaranty Fund, theretofore pictured as "Sound as the Rock of Gibraltar," was sworn to be defunct in the petition as filed.

There can be no more typical example of the application of the rule of waiver of the right to queston the enforcement of an assessment and the estoppel of the party charged to deny liability than above demonstrated.

ARGUMENT ON QUESTION OF WHETHER OR NOT THE ISSUE BEFORE THIS COURT IS MOOT

At this time interveners desire to direct the attention of the Court to the fact that the position of intervening depositors in this case must be clearly distinguished from that taken by appellees, Weaver et al., as shown by their Propositions of Law 20 and 21. (Brief pp. 214-217).

Therein it is contended that the Legislature passed a valid Act at an "Extraordinary Session" convened on March 4, 1930, and adjourned March 15, 1930; that at this special session "the Guaranty Fund Law was modified." The fact is the Guaranty Fund Law was not modified, but an attempt was made to repeal in toto the entire Act, including Section 8028. That section provides for the special assessment of five-tenths of one per cent,

which we have shown to have been in full force and effect at all times when intervening depositors' rights accrued. What the Legislature attempted, was to create a "Depositors' Final Settlement Fund," in an endeavor to relieve the banks of the major portion of their responsibility to intervening depositors with accrued claims. On the pages referred to in appellee Weaver's brief, they insist that by reason of this enactment of 1930, the questions before the Court are moot and assume in their brief that the Act of this "Extraordinary Session" has relieved the banks and that their claim of confiscation must now fall.

It may be that the appellees, Weaver et al., look upon the important issues herein as moot and in instances some banks may regard this case as moot, but the rights of these intervening depositors should not be measured in this action by the admission or contentions of appellees, Weaver et al., nor by what was attempted at this "Extraordinary Session" of 1930. These interveners, as a matter of law must be permitted to question the propriety and the legality of the Settlement Fund, should they so elect, in a proper proceeding instituted in a proper court. These interveners submit that such Act has no place in the consideration of the issues raised by interveners in this case, because (a) interveners' rights are contractual; (b) the contract has become executed; (c) the amount due has been adjudicated and judgments rendered; (d) there can be no enforcement of the judgment nor satisfaction thereof except by the continuation of the special assessment by the banks into the Guaranty Fund in the amount and in the manner provided by the laws in force from 1923 to 1928, inclusive, during which time interveners' deposits were made and maintained and when the banks failed or were taken over by the Guaranty Fund Commission.

It is the statutes in force and effect during that

period which must of necessity be construed by the Court in this action.

Appellees, Weaver et al., cite four cases to sustain their contention that the question is moot. Without discussing each of the four cases cited, we contend that they are not in point, because there were no accrued rights as a matter of law to be respected, and the rights of the respective parties had been concluded prior to the submission on appeal. Consequently the questions were moot.

Interveners call the Court's attention to City of Boston vs. Jackson, 260 U. S. 309, wherein it is said that the question therein was not a moot one:

> "But the tax had been paid before the Supreme Judicial Court took up, considered and decided the case. It must therefore have found as it was entirely justified in doing that the bill in its averments, prayer and real object was directed not only against the collection of the tax then pending, but against future payments of the treasury of the commonwealth and against the continued operation by the trustees under the statute of 1918 with the possible incurring of future deficits to be assessed against the city for collection."

Groesbeck vs. Duluth, S. S. & R. Co., 250 U. S. 607.

The syllabus in this case reads as follows:

> "Appeal of defendants, in a railroad's suit to enjoin enforcement of a state rate-fixing statute as confiscatory, does not become moot by the repeal of the statute, where the railroad has been required to issue to intrastate passengers receipts agreeing to refund, if the statute should be held valid, the

excess fare paid; a large fund having accumulated pending litigation, and the refund coupons being outstanding."

It would seem to appellees that these cases are analagous. Obligations have been incurred. Depositors have unquestionably entered into innumerable transactions based upon their money being safeguarded in the manner provided by law. Business of a bank went on whether the Guaranty Fund Commission was in charge or not. The right to operate the bank, whether solvent or insolvent, was one of the features of the 1923 statute, which continued in force until after this litigation was started. It cannot be said that the appeal before this Court is moot when interveners are before the Court representing approximately twenty-five millions of dollars of adjudicated and unpaid claims arising under the 1923 enactment and the banks liable for these claims seek to enjoin the collection of the assessment provided for the means of payment. Nor is it moot because the Legislature elected at a special session to repeal the Act and substitute something else in its place which does not provide for the entire fulfillment of the obligations that arose under the previous laws.

Even though the Act is unconstitutional or non-enforcible as to all depositors' claims which accrued after December 21, 1928, the law as above set forth establishes intervening depositors' rights to have the 1923 special assessment continued against all the banks, until there is no further depletion in the Guaranty Fund as defined in Section 8028 Sess. Laws. Neb. 1923, page 452. The terms of that section provide the means for the payment into the Fund, which insures its solvency, and in turn the payment of the interveners' adjudicated claims. These are some of the substantial matters before this Court for determination and are not moot.

CONCLUSION

Interveners conclude that their plea of waiver and estoppel has been sustained and that appellant's contention of confiscation has not been established as a violation of the Fourteenth Amendment in light of interveners' accrued rights.

The contractual obligations prescribed by the law, accepted and acted upon by the appellant and all other State banks, became absolute during the period that intervening depositors were entrusting and maintaining their funds in State banks. At such time the interveners had no knowledge nor means of acquiring knowledge of the then condition of banks and the Guaranty Fund, whatever it was. The interveners relied upon the terms of the Act and its frequent adjudication by the courts. The banks were given the opportunity of control and precise information under the Act of 1923.

The record discloses that the equities are with the depositors, and that a moral obligation is imposed upon the State to compel the fulfillment by the banks of their part of the contract.

The banks have at no time offered to do equity by paying the accrued obligations and then be relieved. They assert no equities exist in favor of interveners.

The record discloses certain worthwhile benefits to the banks, acknowledged and accepted by them; and the fact that the anticipated benefits proclaimed by the banks were not realized affords no logical ground in law or equity that will permit them to evade their responsibility.

The substantial rights of interveners accrued under the 1923 Act, and the aggressive activities of the appel-

lant and other State banks were patent to the interveners and the public at large.

The contentions of appellant are two-fold; one of which is, that the Act should be for the benefit of the bank's own depositors and the depositors in other solvent banks, and the other that because the special assessment must now be used to pay the accrued claims of depositors in failed banks, it bears no relation to the public welfare and has thus become unreasonable. Neither contention recognizes the rights of intervening depositors, who placed their money in solvent banks relying upon the terms for payment prescribed by the Act.

In support of the two contentions of the appellant, the original decision of this Court is criticized in its present application, because appellant contends it was based upon the supposed operation of the law. Intervening depositors having implicit faith in the ability of the banks to fulfill their promises, and in reliance upon the Act, likewise relied upon the supposed operation of the law. Consequently, much of appellant's brief is immaterial to a decision of the questions properly before the Court in this case.

The case of interveners turns on accrued rights, and the questions to be decided by the Court are whether contractual rights of interveners in fact exist, and whether the banks waived their right and are estopped to interpose a defense to defeat such rights under the conditions disclosed. Waiver and estoppel are personal defenses which have been properly pleaded and established by these interveners on behalf of themselves and those similarly situated.

The existence of the contract under the Act of 1923 having been established, the present attack upon the constitutionality of the special assessments becomes im-

material to a decision of the case. It is because of these reasons the appeal should be dismissed.

Respectfully submitted,

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APPENDIX "A"

CASES DECIDED BY SUPREME COURT OF NEBRASKA CONSTRUING GUARANTY FUND ACT AND DEFINING RIGHTS AND LIABILITIES THEREUNDER.

State vs. Farmers and Merch. Bank, 93 Neb. 1 (1913); Galt vs. Hildreth, 100 Neb. 15 (1916); assessment provided by Act construed liability of Bank; State vs. Morehead, 100 Neb. 864 (1917), Banking Act construed as to rights to withhold new charter because of Guaranty Fund needing protection (See page 871); Central St. B. vs. Far. St. B., 101 Neb. 210 (1917), deposit is agreement and charge against fund; Farren vs. Far. St. B., 101 Neb. 285 (1917), defining a depositor, and benefits of Act; Iams vs. Far. St. B., 101 Neb. 778 (1917), no liability against Guaranty Fund where more than five per cent interest paid; State vs. Far. St. B., 103 Neb. 194 (1919), banks permitted to intervene because interested parties, in litigation involving Guaranty Fund between State and banks; State vs. Banking House, 110 Neb. 564 (1923), wherein deposit construed; State vs. Far. St. B., 111 Neb. 117 (1923), deposits construed in light of Guaranty Fund Act; State vs. Peoples State Bank, 111 Neb. 136 (1923), County Treasurer's deposit construed; State vs. Neb. St. B., 111 Neb. 360 (1923), Guaranty Fund Act construed as to interest; State vs. Am. St., B. 112 Neb. 182 (1924), deposit defined; State vs. Am. St. B., 112 Neb., 272 (1924), liberty bond deposit defined; State vs. Brown County Bank, 112 Neb. 367 (1924), distinction between liability of Fund and bank; State vs. Far. S. B., 112 Neb. 380 (1924), deposit construed not under Act; State vs. Far. S. B., 112 Neb. 474 (1924), deposit construed; Vavra vs. Claridge, 112 Neb. 553 (1924), equitable owner's rights; State vs. South Fork Bank, 112 Neb. 623 (1924), accepted check held deposit; State vs. Far. St. Bk., 112 Neb. 788 (1924),

private arrangements for interest more than five per cent takes deposit out of Guaranty Fund Law; State vs. Am. Ex. Bk., 112 Neb. 823 (1924), depositor takes choice of receiving five per cent and come under Guaranty Act, or more interest and be without its protection; State vs. Brown, 112 Neb. 642 (1924), trust funds under Guaranty Fund Law; State vs. Far. St. Bk., 112 Neb. 788 (1924), certificate bearing more than five per cent not protected; State vs. Wayne County, 112 Neb. 792 (1924), solicitation of deposits by bank does not make deposits loans; State vs. Am. Ex. Bk., 112 Neb. 834 (1924), deposit defined; State vs. Kilgore, 112 Neb. 856 (1924), subrogation to Fund; State vs. Far. St. Bk., 113 Neb. 82 (1925), purpose of statute construed; State vs. Holmes St. Bk., 113 Neb. 93 (1925), credit not subject to check not within Guaranty Law; State vs. Gross State Bank, 113 Neb. 119 (1925), only bona-fide deposits protected; Howell State Bank vs. Estate of Miller, 113 Neb. 117 (1925), bona-fide deposit defined; State vs. Fms. St. Bk., 113 Neb. 348 (1925), deposit under Guaranty Fund Law defined; State vs. Fms. St. Bk., 113 Neb. 497 (1925), enforcement of stockholders' double liability not supplanted by Guaranty Fund Act; State vs. Fms. St. Bk., 113 Neb. 679 (1925), method of computation of interest on claims against insolvent banks defined; State vs. Kilgore, 113 Neb. 772 (1925), The depositors' Guaranty Fund is not liable for the payment of a bank deposit unless both depositor and bank come within the provision of the Bank Guaranty Law; State vs. Atlas Bank, 113 Neb. 843 (1925), certain certificate of deposit held not protected by Guaranty Fund because of paid inducement which ran the interest on the certificate over five per cent; State vs. Far. St. Bk., 114 Neb. 168 (1926), deposit construed within protection of Act; State vs. Gering, 114 Neb. 213. (1926), even though excessive, deposit by County Treasurer protected; State vs. Gering, 114 Neb. 213 (1926), surety who pays liability to Treasurer entitled to preferred claim against Bank Guaranty Fund; State vs. Far. Bk., 114 Neb. 378 (1926), money de-

posited ceases to be money of the depositor and becomes the money of the bank; State vs. Newcastle, 114 Neb. 389 (1926), soliciting and receiving funds by a solvent bank does not necessarily show making loans as distinguished from deposits; Citizens St. B. vs. Strayer, 114 Neb. 566 (1926), the banking business under a State charter is quasi public and subject to reasonable regulations by the State; State vs. American Ex. Bk., 114 Neb. 626 (1926), certificates of deposit construed; State vs. Atlas Bank, 114 Neb. 646 (1926), court may determine status of deposit; State vs. Atlas Bank, 114 Neb. 650 (1926), depositor defined; State vs. Exchange Bank, 114 Neb. 664 (1926), Banking Board trustee for the Guaranty Fund; Nebraska St. Bk. vs. Bruning, 114 Neb. 719 (1926), draft on insolvent bank subrogated to rights of original holder; State vs. Far. St. Bk., 114 Neb. 826 (1926), time certificate construed; State vs. Citiz. St. Bk., 114 Neb. 867 (1926), excess interest construed; State vs. Far. St. Bk., 115 Neb. 46 (1926), certain deposit construed; State vs. Monowi St. Bk., 115 Neb. 396 and 398 (1926), limiting interest on claims against Guaranty Fund; State vs. Far. St. Bk. of Dix, 115 Neb. 574 (1927), construing Guaranty Fund in relation to assignee of certificate; State vs. Citiz. St. Bk., 115 Neb. 593 (1927), definition of deposit protected by Guaranty Fund; State vs. Citiz. St. Bk., 115 Neb. 593 (1927), tort not protected by the Guaranty Fund; State vs. Macy St. Bk., 115 Neb. 606 (1927), bank run by Banking Department protected by Guaranty Law; same in State vs. Citiz. St. Bk., 115 Neb. 611 (1927); Kuhle vs. Far. St. Bk., 115 Neb. 648 (1927), liability fixed by statute; State vs. Sec. St. Bk., 115 Neb. 667 (1927), deposit not protected by Act; State vs. Far. St. Bk., 115 Neb. 702 (1927), Guaranty Fund payments only pursuant to statute; State vs. Citiz. St. Bk., 115 Neb. 776 (1927), Nebraska Statutes Guaranty Fund, departure from common law, and should not be extended by judicial interpretation; Kuhle vs. Far. St. Bk., 115 Neb. 648 (1927), liability to

come under law; State vs. Sec. St. Bk., 115 Neb. 667 (1927), definition of depositors; State vs. Far. St. Bk., 115 Neb. 702 (1927), statute construed; State vs. Citiz. St. Bk., 115 Neb. 890, depositor in good faith defined; State vs. Sec. St. Bk., 116 Neb. 165 (1927), extent of protection of the Fund; Rogers vs. Nat'l Surety Co., 116 Neb. 170 (1927), defines contract under the Act; State vs. Sec. St. Bk., 116 Neb. 223 (1927), validity of pending claims against the Fund; State vs. Far. St. Bk., 116 Neb. 445 (1928), certificate of deposit within Guaranty Law; Harrison St. Bk. vs. First Nat'l. Bk., 116 Neb. 456 (1928), rights of depositor and bank defined; State vs. Clinton St. Bk., 116 Neb. 482 (1928), deposit not within the protection of the Fund; same, State vs. Clinton St. Bk., 116 Neb. 510 (1928); State vs. Sec. St. Bk., 116 Neb. 521 (1928), protection of Fund; same, State vs. Sec. St. Bk., 116 Neb. 530 (1928); State vs. Octavia St. Bk., 116 Neb. 825 (1928), interest on deposit as against Guaranty Fund; State vs. Citiz. St. Bk., 117 Neb. 358 (1928), defines depositor; State vs. Citizens St. Bk., 117 Neb. 358 (1928), relation of banker and depositor created by contract, express or implied; State vs. Ord St. Bk., 117 Neb. 189, taxes paid out of Fund; State vs. Citiz. St. Bk., 117 Neb. 358 (1928), deposit defined, relation between banker and depositor created by contract; State vs. First St. Bk., 117 Neb. 370 (1928), deposits protected by Fund; McBride vs. Taylor, 117 Neb. 381 (1928), bank free from process of any kind, depositor relegated to Fund; Svoboda vs. Snyder St. Bk., 117 Neb. 431 (1928), holds suit against bank taken over by Department, not suit against the State; State vs. Far. St. Bk., 117 Neb. 448 (1928), defines a deposit; Cleary vs. Fidelity & Deposit Co. of Maryland, 117 Neb. 478 (1928), construed liability of Fund; State vs. Citiz. St. Bk., 117 Neb. 860 (1929), protection under the law; Brownell vs. Svoboda, 118 Neb. 76 (1929), Guaranty Fund Commission under the Guaranty Fund statute judgment creates no lien upon the real estate nor assets of the bank; State vs. Nebraska St. Bk., 118 Neb. 660, (1929), construes Guar-

anty Fund Act in reference to interest; Ex. Rel vs. Farmers St. Bk., 118 Neb. 743, certificate of deposit not chargeable against Fund because of excess rate of interest; Abie State Bank vs. Governor Weaver, 119 Neb. 153 (1930), holding Bank Guaranty Act and special assessment constitutional, assessments not confiscatory, and banks estopped to deny liability for assessment under facts disclosed. (Last decision only appealed to the Supreme Court of the United States on the grounds of taking property without due process of law).